

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

David Montano and Gaston Nieves,

Plaintiffs,

versus

Montrose Restaurant Associates, Inc.,

Defendant.

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Civil Action H-12-153

Opinion on Summary Judgment

1. *Introduction.*

A gourmet restaurant obliged its waiters to share their tips with the barista. Two waiters sued, saying they may not be forced to share with workers who do not customarily receive tips – like cooks or janitors. The restaurant will prevail because Tony's baristas directly aid in serving diners.

2. *Background.*

Taking one plaintiff as illustrative, David Montano worked as a captain at Tony's Restaurant for 23 years. Captains manage a section of tables, called a station. The station's team – the captain, two waiters, a busboy, and a bartender – pool their tips. The other plaintiff, Gaston Nieves, was a waiter.

At Tony's, the barista receives a total of \$10 per station per shift. On October 20, 2011, a Thursday, Montano's station earned \$747 in tips. The captain's share of 35% was \$210, each waiters' share of 25% was \$175, the busboy's share of 15% was \$140, and the bartender's share of 1% was \$37. On a night when Montano earned \$210, he was forced to give \$3.50 to the barista. The restaurant says that even this small tip makes the barista feel like part of the station, motivating him to help the team improve customer service, earning their tips.

The parties disagree about the precise duties required of baristas. Montano says that the barista primarily works in the kitchen, making coffee. He has affidavits from a former barista and waiters saying that baristas do not work in the dining room.

Tony's says that baristas do more than make drinks for diners. Tony Vallone, the president of Tony's, says that they assist the busboys, warm bread, deliver food to tables, and refill water glasses.

In August of 2011, it appears that the expectations for baristas may have changed. They were required to wear uniforms like servers and deliver food when the restaurant is busy. For this decision, the court accepts Montano's version of the facts.

3. *Tip Sharing.*

Although the minimum wage is \$7.25 per hour, restaurants may pay waiters \$2.13 per hour when (a) they retain tips directly from customers, and (b) they earn at least \$7.25 per hour in tips and base pay. Montano says that Tony's owes him \$5.12 per hour more in base pay because its requirement for him to share tips with the baristas.

Restaurants may require waiters to pool tips among tipped workers,¹ but if they must share with workers who are not eligible to be tipped, the restaurant must pay its waiters the minimum wage directly.

A worker who is not tipped by or did not interact with diners may legally participate in a tip pool.² The parties concede, for instance, that waiters may be forced to share with a service bartender who works out of sight. For a worker to be eligible for sharing, his work must be important for direct diner service.³

At Tony's, the difference between a service bartender and its barista is insignificant; being a barista requires similar but lesser skills and translates into the same support of the waiters' responsibilities to the diners. One works with alcohol; the other works with coffee beans. Both prepare a variety of drinks – think lattes and cappuccinos as well as black – that affect how diners perceive the restaurant and the waiters' level of help. In fact, *barista* means bartender in Italian.⁴

The parties dispute about the responsibilities of baristas at Tony's does not affect this aspect of their work; everyone agrees that they make coffee and related concoctions. The barista

¹ 29 U.S.C. § 203(m) (2012).

² Department of Labor Field Operations Handbook § 30004(a)(5); *Roussell v. Brinker Int'l, Inc.*, 2008 WL 27114079, at *10 (S.D. Tex. June 9, 2008).

³ *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 301 (6th Cir. 1998).

⁴ Peter F. Ross, *Hippocrene's Italian to English Dictionary* 234 (1st ed. 1983).

directly supports the waiters. He is an aide, not a remote coworker like a janitor or cook. Prompt, skillful preparation of these drinks produces diner satisfaction.

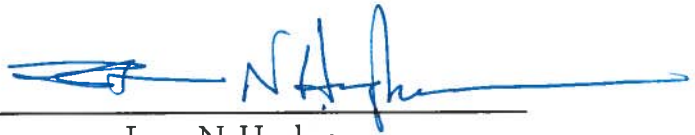
Assuming baristas rarely helped diners by warming bread, refilling water glasses, or delivering food, Tony's may require its waiters to share their tips with them. If the tip was merely a courtesy instead of an incentive – a token of the waiter's gratitude to a coworker who makes less than one-fourth of the captain's pay – it would still not be illegal.

4. *Conclusion.*

Montano was not exploited. He worked at one of the most highly regarded restaurants in Texas, and he was paid well for it. He is complaining about his "tip" of \$3.50 a night to a coworker who helped Montano earn his good wage.

David Montano and Gaston Nieves will take nothing from Montrose Restaurant Associates, Inc.

Signed on February 4, 2014, at Houston, Texas.



Lynn N. Hughes
United States District Judge